

# EQUALITY OR DYSFUNCTION? STATE TAX LAW IN A POST-WINDSOR WORLD

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## I. INTRODUCTION

Depending on one's religious and political proclivities, the United States Supreme Court's decision in *United States v. Windsor*<sup>1</sup> can either been seen as a progressive step towards equality<sup>2</sup> or a troublesome departure from traditional marriage norms.<sup>3</sup> Notwithstanding, from a federal tax perspective, the *Windsor* decision clearly raised a myriad of issues that spanned virtually the entire Internal Revenue Code (the "Code"), including but not limited to income taxes (including filing status), estate and gift taxes, payroll taxes, and the tax treatment of retirement account contributions and social security benefits. In the aftermath of *Windsor*, the Internal Revenue Service ("IRS") was left with a quandary in administering marital-status-dependent Code provisions: should it base its administration of the Code on the taxpayer's valid marriage in the state in which it was performed (commonly referred to as the "state of celebration" test) or the taxpayer's state of residence or domicile (commonly referred to as the "state of residence" test)? The IRS resolved most of the federal tax issues raised by *Windsor* in its issuance of Revenue Ruling 2013-17,<sup>4</sup> which chiefly adopted a state-of-celebration test for income and other tax purposes.<sup>5</sup> However, the ruling did not extend to quasi-marital statuses, such as domestic partnerships and civil unions, resulting in federal tax non-recognition and complexities for couples in those legally recognized relationships.<sup>6</sup>

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1. *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675 (June 26, 2013).

2. Adam Liptak, *Supreme Court Bolsters Gay Marriage With Two Major Rulings*, N.Y. TIMES, June 26, 2013, <http://www.nytimes.com/2013/06/27/us/politics/supreme-court-gay-marriage.html?pagewanted=all>.

3. Brian Brown, *Supreme Court issues two illegitimate decisions on gay marriage*, FOXNEWS.COM (June 26, 2013), <http://www.foxnews.com/opinion/2013/06/26/supreme-court-issues-two-illegitimate-decisions-on-same-sex-marriage/>.

4. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

5. See *infra* note 79 and accompanying text.

6. See *infra* note 80 and accompanying text.

*Windsor* also raised innumerable state and local taxation issues, particularly for the majority of the states that outright ban, or otherwise do not recognize, gay marriages. The *Windsor* decision's failure to completely repeal all provisions of the Defense of Marriage Act ("DOMA"),<sup>7</sup> specifically Section 2,<sup>8</sup> permits states to continue such bans or lack of recognition, resulting in significant state and local tax complexities for same-sex couples that reside in such states but chose to marry in one of the seventeen states (and District of Columbia) that permit it.<sup>9</sup> Thus, a post-*Windsor* world remains complex and uncertain for a majority of married same-sex couples.<sup>10</sup> As with federal taxation, for couples in a domestic partnership or civil union, their state and local taxation issues remain much as they did prior to *Windsor* and Revenue Ruling 2013-17 – complex and uncertain.

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7. Defense of Marriage Act, Pub. L. No. 104-19, 110 Stat. 2419 (enacted September 21, 1996), (codified as 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

8. See *infra* note 17 and accompanying text.

9. See NAT'L CONF. OF STATE LEGISLATURES, DEFINING MARRIAGE: DEFENSE OF MARRIAGE ACTS AND SAME-SEX MARRIAGE LAWS (2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>. Wyoming recognizes same-sex marriage only for the limited purpose of divorcing the couple. *Christiansen v. Christiansen*, 253 P.3d 153 (Wyo. 2011). Marital recognition by seventeen states and the District of Columbia is an accurate statement as of the date this Article was sent to print. As this Article is sent to print, at least four states' ban on same-sex marriage—Utah, Oklahoma, Virginia, and Nevada—remains dubious. On December 20, 2013, a federal judge ruled that Utah's state law banning same-sex marriage was unconstitutional in light of equal protection and due process guarantees. *Kitchen v. Herbert*, No. 2:13-cv-217, 2013 WL 6697874 (D. Utah Dec. 20, 2013). The Supreme Court stayed that decision on January 6, 2014, pending final disposition by the U.S. Court of Appeals for the Tenth Circuit. Order in Pending Case, *Herbert v. Kitchen* (No. 13A687), available at [http://www.supremecourt.gov/orders/courtorders/010614zr\\_2co3.pdf](http://www.supremecourt.gov/orders/courtorders/010614zr_2co3.pdf). On January 14, 2014, a federal district court judge ruled that Oklahoma's constitutional ban on same-sex marriage violated the equal protection clause of the U.S. Constitution, but stated that the court would not immediately enforce the judgment pending appeal. Greg Botelho, *Federal judge: Oklahoma ban on same-sex marriage unconstitutional*, CNN.COM (Jan. 14, 2014), <http://www.cnn.com/2014/01/14/justice/oklahoma-gay-marriage/>. On January 23, 2014, the Virginia Attorney General announced that the state's ban on same-sex marriage violated due process and equal protection rights under the 14th Amendment: "I cannot and will not defend a law that violates Virginian's fundamental constitutional rights." Timothy Williams & Trip Gabriel, *Virginia's New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES, Jan. 23, 2014, [http://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html?\\_r=0](http://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html?_r=0). On February 13, 2014, a federal judge ruled that Virginia's same-sex marriage ban violated the Due Process and Equal Protection guarantees of the Fourteenth Amendment. Erik Eckholm, *Federal Judge Overturns Virginia's Same-Sex Marriage Ban*, N.Y. TIMES, Feb. 14, 2014, <http://www.nytimes.com/2014/02/14/us/federal-judge-overturns-virginias-same-sex-marriage-ban.html>. On February 10, 2014, Nevada's attorney general and governor announced their decision to not support or defend the state's ban on same-sex marriage. Sandra Chereb, *Nevada Withdraws Efforts to Uphold Gay Marriage Ban*, HUFFINGTONPOST.COM (Feb. 10, 2014), available at [http://www.huffingtonpost.com/2014/02/10/nevada-gay-marriage\\_n\\_4763229.html](http://www.huffingtonpost.com/2014/02/10/nevada-gay-marriage_n_4763229.html).

10. See *infra* notes 106-107 and accompanying text.

## II. OVERVIEW OF *UNITED STATES V. WINDSOR*

Marriage and domestic relations have long been regarded as within the purview of state law.<sup>11</sup> However, states may not impose restrictions on marriages that violate the U.S. Constitution, including restrictions on opposite-race couples and those owing child support.<sup>12</sup> In 1993, the Hawaii Supreme Court issued the first state court decision to hold that a state statute restricting marriage to a male and female was unconstitutional as a “sex-based classification.”<sup>13</sup> The decision was seen as the first step towards legalized marriage for same-sex couples.<sup>14</sup> Through its subsequent enactment of DOMA in 1996, Congress sought to “preempt the argument that states would have to recognize same-sex unions from other states,”<sup>15</sup> and rejected the long-established principle that marriage was a matter reserved for state law by providing a federal definition of marriage.<sup>16</sup> Section 2 of DOMA permits states to refuse to recognize same-sex marriages performed under the laws of other states.<sup>17</sup> Section 3 amended the United States Code to define “marriage” and “spouse” for federal law purposes:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers

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11. See *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (domestic relations is an “area that has long been regarded as a virtually exclusive province of the States.”); see also David J. Herzog, *Justice for All: The IRS Reimagined*, 33 VA. TAX REV. 1 (2013); William Baude, *Beyond DOMA: Choice of Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2013).

12. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (state statute restricting marriage to couples of the same race violated equal protection and due process clauses of the U.S. Constitution); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (prohibition on marriages involving persons owing child support violated the equal protection clause); *United States v. Windsor*, 570 U.S. \_\_\_, 133 S. Ct. 2675, 2689-90 (June 26, 2013) (stating “by history and tradition the definition and regulation of marriage has been treated as being within the authority and realm of the separate States”).

13. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993). Specifically, the court determined that sex-based classifications are subject for equal protection purposes under the Hawaii Constitution, to strict scrutiny review. *Baehr*, 852 P.2d at 64-65.

14. Jeffrey Schmalz, *In Hawaii, Step Toward Legalized Gay Marriage*, N.Y. TIMES (May 7, 1993), available at <http://www.nytimes.com/1993/05/07/us/in-hawaii-step-toward-legalized-gay-marriage.html>.

15. David J. Herzog, *Same-Sex Marriage and Estate Taxes: Why Windsor Is Still at Issue*, (Oct. 7, 2013), available at <http://taxprof.typepad.com/files/141tn0079.pdf>.

16. *Windsor*, 133 S. Ct. at 2692.

17. 28 U.S.C. § 1738C (2013), which reads: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”

only to a person of the opposite sex who is a husband or a wife.<sup>18</sup>

This definitional provision of DOMA was primarily at issue in *Windsor*.<sup>19</sup>

After a forty-three-year relationship, Edith Windsor and Thea Spyer celebrated their marriage ceremony in Canada in 2007.<sup>20</sup> Spyer died in 2009, leaving her entire estate to Windsor.<sup>21</sup> New York subsequently passed its Marriage Equality Act, permitting same-sex marriages in the state beginning on July 24, 2011.<sup>22</sup> Because they were both New York residents, Windsor and Spyer's Canadian marriage was validly recognized under New York law.<sup>23</sup> At the time of Spyer's death, DOMA effectively denied federal recognition of their marriage, thus precluding Windsor as the surviving spouse from qualifying for the federal estate tax marital deduction that excludes from estate tax "any interest in property which passes or has passed from the decedent to his [or her] surviving spouse."<sup>24</sup> Consequently, Windsor incurred \$363,053 in estate taxes for which she sought a refund,<sup>25</sup> thus initiating the tax refund litigation that ended in the U.S. Supreme Court. In the ensuing litigation, Windsor claimed that DOMA violated her constitutional guarantee of equal protection under the law.<sup>26</sup>

The Supreme Court affirmed the lower courts' findings that DOMA violated Fifth Amendment due process and equal protection restraints on actions of the Federal Government.<sup>27</sup> The Court explained that "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."<sup>28</sup> The Court further stated that DOMA departed from the typical deference to state definitions of marriage, thereby depriving same-sex couples of the benefits and responsibilities conferred by the federal

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18. 1 U.S.C. § 7 (2013).

19. *Windsor*, 133 S.Ct. at 2683.

20. *Id.*

21. *Id.*

22. See Marriage Equality Act, 2011 N.Y. Laws 749 (codified at N.Y. Dom. Rel. Law. Ann. §§ 10-a, 10-b, 13). See also Nicholas Confessore and Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, (June 24, 2011), available at <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html>.

23. *Windsor v. U.S.*, 699 F.3d 169, 177-78 (2d Cir. 2012).

24. *Windsor*, 133 S. Ct. at 2683; I.R.C. § 2056(a) (2013).

25. *Windsor*, 133 S. Ct. at 2683.

26. *Id.*

27. *Id.* at 2693; U.S. CONST. amend. V. The Fifth Amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

28. *Id.* (citing *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

recognition of their marriages.<sup>29</sup> Accordingly, DOMA resulted in a “disadvantage, a separate status, and so a stigma” upon all individuals lawfully participating in a same-sex marriage.<sup>30</sup> The Court determined that DOMA was enacted primarily to interfere with the “equal dignity of same-sex marriages . . . conferred by the States.”<sup>31</sup> The resulting “second-class” treatment of same-sex marriages under DOMA, opined the Court, raised a “serious question” under the Fifth Amendment.<sup>32</sup> Finally, the Court found that the differing treatment of same-sex marriages not only “demeans the couple” but also “humiliates tens of thousands of children now being raised by same-sex couples.”<sup>33</sup> The Court noted that the results of DOMA’s unequal treatment of same-sex marriages have been numerous, including denial of government health benefits, inapplicability of certain protective criminal laws, taxation of health benefits to same-sex spouses, and denial or reduction of social security benefits.<sup>34</sup> For all of these reasons, the Supreme Court found DOMA to be unconstitutional and invalid, lacking any legitimate purpose for its denial of the equal protection of the laws to same-sex couples in states that permit their lawful marriages.<sup>35</sup>

The *Windsor* decision clearly is a step forward for same-sex marriage. Nevertheless, it presently has wide-reaching consequences as to federal and state tax issues for married same-sex couples, in part because the decision is limited to the seventeen states and the District of Columbia that currently sanction same-sex marriages (hereinafter, the “recognition states”).<sup>36</sup> Because the decision left Section 2 of DOMA untouched,<sup>37</sup> the other thirty-three states are still not required to allow same-sex marriage nor recognize the same-sex marriages lawfully performed in the other states (hereinafter, the “non-recognition states”).<sup>38</sup> Thus, same-sex couples married in a recognition state, but residing in a non-recognition state, will still incur differential treatment, as discussed further below. Justice Scalia’s dissent seemed to foreshadow the difficult choice-of-law issues that would arise in a post-*Windsor* world:

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29. *Id.* at 2693.

30. *Id.*

31. *Id.* (citing H.R. REP. NO. 104-664, at 16 (1996) (House determined that DOMA expresses “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.”)).

32. *Id.* at 2693-94.

33. *Id.* at 2694 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)); see generally, Anthony C. Infanti, LGBT Families, Tax Nothings, — J. GENDER RACE & JUST. — (2013).

34. *Id.* at 2694-95.

35. *Id.* at 2696.

36. *Id.* See also *supra* note 9 and accompanying text.

37. *Windsor*, 133 S. Ct. at 2682-83.

38. See *supra* note 9 and accompanying text.

Imagine a pair of women who marry in Albany [New York] and then move to Alabama, which does not "recognize as valid any marriage of parties of the same sex." . . . When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law?<sup>39</sup>

The IRS's administrative response to *Windsor*—Revenue Ruling 2013-17—will answer at least one of the questions posed by Justice Scalia by providing that the state of celebration will govern for federal tax law purposes.<sup>40</sup> However, that ruling, like *Windsor*, is limited to valid state law marriages, and does not include other legally recognized relationships like civil unions and domestic partnerships.<sup>41</sup> The limitation of the IRS ruling, along with the continued validity of Section 2 of DOMA, will continue differentiating and complicating state law tax treatment for lawfully married same-sex couples that reside in a non-recognition state, as well as all couples currently in a civil union or domestic partnership.<sup>42</sup>

### III. THE IRS ADMINISTRATIVE RESPONSE TO *WINDSOR*

Before addressing the state tax law issues raised both by *Windsor* and the IRS's response to *Windsor*—Revenue Ruling 2013-17—it is necessary to briefly examine the historic interaction between federal tax and state laws, specifically the determination of residence and domicile under state and local tax law, and the effect of such interaction with respect to marital status. Furthermore, this examination is the origin of any tax law discussion in a post-*Windsor* world: what definition of marriage should be applied for federal as well as state tax law purposes.<sup>43</sup>

#### A. INTERACTION OF FEDERAL TAX AND STATE LAWS GENERALLY

As one legal commentator has stated, most federal income tax questions involve "threshold issues of state law, because the tax-

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39. *Windsor*, 133 S. Ct. at 2708.

40. See *infra* note 79 and accompanying text.

41. See *infra* note 80 and accompanying text.

42. See *infra* notes 106-146 and accompanying text.

43. Herzog, *supra* note 15.

payer's rights, liabilities, and status under local law are the infrastructure on which federal tax liability rests."<sup>44</sup> If state law were not consulted to determine such rights and responsibilities, the IRS, according to that commentator, would be a "fish out of water."<sup>45</sup> Obviously, the definition of common terms such as "marriage," "sale," or "lease" can vary from state to state.<sup>46</sup> In *Burnet v. Harmel*,<sup>47</sup> that variance was addressed by the Supreme Court:

The exertion of [Congress's power to tax income] is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation . . . . State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law. . . . The state law creates legal interests but the federal statute determines when and how they shall be taxed.<sup>48</sup>

Although *Harmel* appears to establish a presumption in favor of "uniform application," what constitutes "uniformity" is far from clear.<sup>49</sup> While *Harmel* would, for example, suggest a uniform federal definition of what constitutes a "sale," other Supreme Court decisions have implied that a term's "non-tax" meaning, which implicitly emanates from state law, should generally prevail.<sup>50</sup>

In certain instances, the Code defines a term and specifically supersedes state law in doing so. For example, Code section 6013(d)(2) provides that a person "legally separated from his spouse under a decree . . . of separate maintenance shall be not be considered as married," thus preventing that couple from filing a joint income tax return even if that couple is still deemed to be married under the law of their domicile.<sup>51</sup> Particularly relevant to this Article's discussion, until the *Windsor* decision, the Defense of Marriage Act limited the concept of "marriage" for purposes of all federal laws (including the Code) to

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44. BORIS I. BITTKER, MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 1.02[5], at 1-22 (3d ed. 2002).

45. *Id.* at 1-17.

46. *Id.* at 1-17, 1-19.

47. 287 U.S. 103, 110 (1932).

48. *Id.*

49. BITTKER ET AL., *supra* note 44, ¶ 1.02[1], at 1-18.

50. *Id.* (citing *Commissioner v. Brown*, 380 U.S. 563, 569-71 (1965) (in determining the meaning of "sale" under IRC §1222(3), the Supreme Court stated that: "[a] 'sale,' . . . is a common event in the non-tax world; and since it is used in the Code without limiting definition and without legislative history indicating a contrary result, its common and ordinary meaning should at least be persuasive of its meaning as used in the Internal Revenue Code.")).

51. BITTKER ET AL., *supra* note 44, ¶ 1.02[2], at 1-19; see I.R.C. § 6013(a) (2013).

"only a legal union between one man and one woman as husband and wife," regardless of any state law to the contrary.<sup>52</sup> In other instances, the Code explicitly adopts states law as controlling, such as community property state laws.<sup>53</sup> Finally, in numerous occasions, the Code utilizes terms without either adopting a state law meaning or applying a uniform federal definition.<sup>54</sup>

## B. RESIDENCE VS. DOMICILE

Because states retain the constitutional power to tax the personal income of their residents without regard to the sources of such income,<sup>55</sup> the determination of a particular taxpayer's residence is crucial.<sup>56</sup> Generally, states define a "resident" in numerous ways, but the definition typically includes "domicile,"<sup>57</sup> which is generally defined as a taxpayer's fixed or permanent home or the "place, whenever the person is absent, he or she has the intention of returning."<sup>58</sup> Domicile turns predominantly on the taxpayer's intent, with the taxpayer bearing the burden of proof.<sup>59</sup> Therefore, a taxpayer can be a resident in a state in which he or she is not domiciled. Accordingly, the concept of "residence" is broader and is generally classified by states as including one or more of five components:

1. Domicile in the state;
2. Presence in the state for other than a temporary or transitory purpose;
3. Presence in the state for a specified period of time – either six, seven or nine months;
4. Maintenance of a permanent place of abode or a place of abode for a specified period of time; and
5. A presence in the state for a specified period of time accompanied by the maintenance of a permanent place of abode.<sup>60</sup>

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52. Defense of Marriage Act, Pub. L. No. 104–199, §1, 110 Stat. 2419, (codified at 1 U.S.C. §7).

53. BITTKER ET AL., *supra* note 44, ¶ 1.02[3], at 1-20; *see* I.R.C. § 66(d)(3) (2013).

54. BITTKER ET AL., *supra* note 44, ¶ 1.02[4], at 1-20.

55. Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 (1995).

56. WALTER HELLERSTEIN, KIRK J. STARK, JOHN A. SWAIN, AND JOAN M. YOUNGMAN, STATE AND LOCAL TAXATION, CASES AND MATERIALS 351 (9th ed. 2009).

57. *Id.* at 352.

58. *See, e.g.*, VT. CODE R. § 1.5811(11)(A)(i)(2)(a) (2013).

59. *See, e.g.*, Va. Dept. of Tax'n, Virginia Ruling of the Commissioner P.D. 00-179 (Oct. 5, 2000) (taxpayer legally separated from his wife was able to prove domicile in another state by vehicle registration, apartment lease, and driver's license from another state).

60. GEORGE T. ALTMAN & FRANK M. KEESLING, ALLOCATION OF INCOME IN STATE TAXATION 43 (2d ed. 1950).



Accordingly, a taxpayer's presence in a state for a certain period of time can lead to a determination that a taxpayer is a resident of that state and thus subject to its taxation even though such presence is likely insufficient for domicile.<sup>61</sup> For example, an attorney that is domiciled in New Jersey can nevertheless be a resident of New York because she is present in New York City for more than 183 days and maintains an apartment there.<sup>62</sup> Clearly, when a taxpayer is deemed a resident of more than one state there is a real possibility of double taxation, but all states with a personal income tax generally address such possibilities by providing a tax credit for taxes paid by their residents to another state.<sup>63</sup> Without *Windsor* and Revenue Ruling 2013-17, if the above example involved a same-sex couple with multiple residences, the IRS would have to determine which state law to apply in administering federal tax rules to any transfers between the two individuals in a given year or at death.<sup>64</sup> Furthermore, what if the couple had several residences in which they lived approximately equal parts of the year? If a state of residence test were applied, the IRS would have had to resolve the residence/domicile question and determine whether their marriage should be recognized for federal tax purposes. As discussed below, from a practical administration perspective, the IRS's adoption of a state-of-celebration rule generally obviates the need to make such difficult determinations and applies federal tax rules based on a valid marital relationship in the state of celebration.<sup>65</sup> Unfortunately, these precarious multistate tax issues remain for same-sex (and opposite-sex in some states) partners in a civil union or a domestic partnership.

### C. DETERMINATION OF MARITAL STATUS FOR FEDERAL TAX PURPOSES

Curiously, with all of the debate surrounding *Windsor* and whether same-sex marriage can be duly regarded for federal tax pur-

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61. HELLERSTEIN ET AL., *supra* note 56, at 352.

62. *Id.*; see, e.g., N.Y. TAX LAW § 605(b) (2013) (excluding from definition of resident a person domicile in New York except those who (i) retain no permanent abode in the state, (ii) retain a permanent abode elsewhere, and (iii) spend 30 days or less in the state).

63. HELLERSTEIN ET AL., *supra* note 56, at 357, 397. This commonly happens when a taxpayer resides in one state but has income earned from services or property owned in another state. Under "source" taxation, the state of nonresidency has the constitutional right to tax nonresidents' income from services or business carried on, or property owned in, that state. *Shaffer v. Carter*, 252 U.S. 37, 52 (1920). Generally, the state of residency grants its resident taxpayers a tax credit for taxes paid to source states. HELLERSTEIN ET AL., *supra* note 56, at 397.

64. See *infra* notes 67-68 and accompanying text on courts' typical practice of looking to taxpayers' state of domicile for determining marital status for federal tax purposes.

65. See *infra* note 79 and accompanying text.

poses, there is no specific Code section or regulation that provides a choice-of-state-law rule for determining whether two individuals are validly married. Code section 7703 states that for federal tax purposes, "the determination of whether an individual is married shall be made as of the close of his taxable year," with some narrow exceptions.<sup>66</sup> Case law closes the choice-of-law gap by providing that a couple's marital status is governed by state and local law,<sup>67</sup> typically looking to the state of domicile at the time of the transaction or other life event at issue (i.e., divorce or death).<sup>68</sup>

As previously introduced, the 1996 enactment of DOMA resulted in a federal definition of marriage, rejecting the long-established principle that marriage was a matter reserved for state law.<sup>69</sup> Thirty-seven states followed suit over the next decade, enacting legislation or constitutional amendments defining marriage as only between a man and a woman for state law purposes.<sup>70</sup> The IRS followed DOMA without regard to the emergence of state same-sex marriage laws until the Supreme Court's decision in *Windsor* on June 26, 2013. That decision resulted in the IRS's return to state law definitions of marriage and an administrative quandary – with respect to marital-status-dependent Code provisions should it return to its historical application of the law

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66. I.R.C. § 7703(a)(1) (2013).

67. BITTKER ET AL., *supra* note 44, ¶ 44.02[6], at 44-31-44-32; *see, e.g.*, *Lee v. Comm'r*, 64 T.C. 552, 556 (1975) ("This Court has continuously held that for purposes of [Code] section 6013 and other Code provisions the marital status, its existence and dissolution, is defined by State rather than Federal law.") and cases cited therein. In *Lee*, the United States Tax Court declined to follow the Second Circuit's decision in *Borax' Estate v. Comm'r*, 349 F.2d 666 (2d Cir. 1965), which proposed a uniform federal standard in determining whether a couple is "husband and wife" for purposes of Code section 6013. Rather, the Tax Court decided to rely on its own prior decisions and of the Ninth Circuit in *Albert Gersten*, 28 T.C. 756, 770 (1957), *aff'd* 267 F.2d 195 (9th Cir. 1959), as the correct approach. *Lee*, 64 T.C. at 556. *See also* Rev. Rul. 83-183, 1983-2 C.B. 220 ("Taxpayers who meet the requirements in their state of residence for a valid marriage may file a joint return even though they have never been legally declared married by a court of law.").

68. *Lee*, 64 T.C. at 559. *See also* *Estate of Steffke*, 538 F.2d 730, 735 (7th Cir. 1976) (as to the validity of a divorce, "the decision should be followed for federal estate taxation purposes that would be followed by the state which has primary jurisdiction over the administration of a decedent's estate, i.e., the jurisdiction in which the decedent was domiciled at the time of his death.").

69. *See supra* note 16 and accompanying text. *See also* David J. Herzig, *The Tax Implications of Windsor*, TAXPROF BLOG (June 27, 2013), available at [http://taxprof.typepad.com/taxprof\\_blog/2013/06/herzig-tax.html](http://taxprof.typepad.com/taxprof_blog/2013/06/herzig-tax.html).

70. PEW RESEARCH RELIGION & PUBLIC LIFE PROJECT, *Same-Sex Marriage State-by-State*, available at <http://features.pewforum.org/same-sex-marriage-state-by-state/>. Actually, Utah enacted the first state Defense of Marriage Act in 1995; a year prior to the enactment of the federal DOMA. *Id.*

of state of domicile or residence, or adopt a state-of-celebration test? Legal commentators conjectured and opined.<sup>71</sup>

Ostensibly, the corresponding tax issues are easier to resolve if the same-sex couple is domiciled in a state where their marriage was performed or in another state that recognizes their marriage as valid (i.e., married in New York and live in Massachusetts). But, the complexity in applying the Code increases exponentially if a same-sex couple is validly married in a recognition state, but resides in a non-recognition state (i.e., married in New York and resides in Nebraska).<sup>72</sup> In making its determination, the IRS had to consider policy arguments that support both approaches, while acknowledging the practical difficulties in administration and enforcement regardless of the approach adopted. If the IRS adopted a state-of-residence test, the determination would require an examination of each state's potentially peculiar approach to domicile, as state and local tax practitioners are keenly aware.<sup>73</sup> If the IRS adopted a state-of-celebration test, the determination would require not only verifying the validity of a couple's marriage in that state, but also addressing the thorny issue of whether civil unions and domestic partnerships under certain states' laws should be treated as equivalent to marriage.<sup>74</sup>

An Ohio case decided after *Windsor*, but prior to any IRS guidance, highlighted the problems associated with the state-of-residence test. In *Obergefell v. Kasich*,<sup>75</sup> the District Court addressed whether the State of Ohio could legally refuse to recognize the same-sex marriage of its residents that was validly performed in another state. Since 2004, same-sex marriages, as well as the recognition of such marriages performed legally in other states, have not been permitted in Ohio.<sup>76</sup> The court examined Ohio law's historic recognition of marriages that were valid in the state performed even though such marriages were invalid in Ohio, such as marriages between first cousins or minors. Based on that historical recognition and the recent *Windsor*

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71. Herzig, *supra* note 69; Patricia Cain, *The Less Obvious Tax Consequences that Arise from the Fall of DOMA*, TAXPROF BLOG (June 28, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/06/cain.html](http://taxprof.typepad.com/taxprof_blog/2013/06/cain.html); Anthony C. Infanti, *The Moonscape of Equality: Windsor and Beyond*, 108 NW. U. L. REV. COLLOQUY 110 (2013).

72. Sheryl Gay Stolberg, *After Rulings, Same-Sex Couples Grapple With Diverging State Laws*, N.Y. TIMES, June 28, 2013, available at <http://www.nytimes.com/2013/06/29/us/after-rulings-same-sex-couples-grapple-with-diverging-state-laws.html?page-wanted=all>.

73. See *supra* notes 61-62 and accompanying text.

74. See *infra* note 80 and accompanying text. In Rev. Rul. 2013-17, 2013-38 I.R.B. 201, the IRS determined that such legalized relationships will not be accorded marriage treatment for federal tax law purposes.

75. Case No. 1:13-cv-501 (S.D. Ohio, July 22, 2013).

76. See OHIO REV. CODE § 3101.01(C)(2) & (3) (2013), and OHIO CONST., art. XV, § 11.

decision, the court determined that the State of Ohio could no longer deny legal recognition to a same-sex couple's marriage validly performed in another state (Maryland) without violating the Equal Protection Clause of the U.S. Constitution.<sup>77</sup> In effect, the *Obergefell* case adopted a state-of-celebration test. Curiously, the IRS's subsequently issued guidance similarly relied on its historic recognition of common law marriages as a legal foundation for its adoption of a state-of-celebration test in Revenue Ruling 2013-17.

#### D. THE IRS'S RESPONSE TO *WINDSOR*: REVENUE RULING 2013-17

##### 1. *Overview of the Revenue Ruling*

In Revenue Ruling 2013-17, the IRS identified and addressed three main tax administration issues that arose from the Supreme Court's decision in *Windsor*. First, it determined that for federal tax purposes, the terms "spouse," "husband and wife," "husband," and "wife" include individuals married to a person of the same sex if their marriage is lawful under state law.<sup>78</sup> Second, with respect to whether it should look to the state of celebration or the state of domicile to determine the validity of same-sex marriages, the IRS adopted a state-of-celebration test.<sup>79</sup> Finally, the IRS declined to extend the above treatment to individuals in registered domestic partnerships, civil unions or other similarly formalized relationships, whether of the opposite or same sex, that is not deemed a marriage under state law.<sup>80</sup>

In reaching the above conclusions, the IRS looked to its historic treatment of common-law marriages as set forth in Revenue Ruling 58-66.<sup>81</sup> The IRS acknowledged that it looks to state law to determine its recognition of marital status for federal income tax purposes.<sup>82</sup> Provided that the state in which the couple entered into common law marriages validly recognized such relationships, the IRS would accord similar recognition for federal income tax purposes.<sup>83</sup> The IRS further concluded that if a couple entered in a common-law marriage in a state that recognized such marriages but later became domiciled in a state that did not, the IRS would nevertheless continue to treat that

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77. U.S. CONST. amend. XIV. The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See also *Obergefell v. Kasich*, Case No. 1:13-cv-501 (S.D. Ohio, July 22, 2013).

78. Rev. Rul. 2013-17, 2013-38 I.R.B. 204.

79. *Id.*

80. *Id.*

81. Rev. Rul. 58-66, 1958-1 C.B. 60.

82. *Id.*

83. *Id.*

couple as married and eligible to file joint income tax returns for federal income tax purposes.<sup>84</sup> Accordingly, the IRS noted that it had applied a state-of-celebration rule with respect to common-law marriages for over 50 years because the change in marital status from a simple move between states would be both cost prohibitive and administratively unfeasible.<sup>85</sup> Therefore, the IRS concluded that it should similarly consult the laws of the state where the same-sex marriage was performed to accord marital status, reserving the right to issue additional guidance on the state-of-celebration rule in the future.<sup>86</sup>

In adopting the state-of-celebration, the IRS joined other federal agencies that have likewise determined the administrative difficulties and compliance uncertainties that would result from a state-of-domicile rule.<sup>87</sup> First, inconsistent application of the related party rules as applied to spouses could arise from a change in domicile of same-sex couples.<sup>88</sup> Specifically, the attribution of property interests from one spouse to another could change by a mere move to a non-recognition state.<sup>89</sup> Second, a state-of-domicile test would present numerous difficulties for employers with respect to the administration of employee benefit plans.<sup>90</sup> Such a test would require employers to regularly track the domicile of employees in a same-sex marriage and further determine whether such employees' spouses reside in a different state.<sup>91</sup> Along with others, these plan administration issues would result in rising employer training, computer systems programming, and plan administration costs. Accordingly, the IRS concluded that following Revenue Ruling 58-66<sup>92</sup> and adopting a state-of-celebration rule would avoid the above difficulties and costs.

## 2. *Ruling's Inapplicability to Domestic Partnerships and Civil Unions*

As discussed above, the IRS determined in Revenue Ruling 2013-17 that these legalized same-sex relationships should not be accorded marriage treatment for federal tax law purposes in a post-*Windsor* world. The ruling specifically states that this conclusion applies to individuals in such relationships whether they are of the opposite sex or

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84. *Id.*

85. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

86. *Id.*

87. See *infra* note 141 and accompanying text.

88. Rev. Rul. 2013-17.

89. *Id.*

90. *Id.*

91. *Id.*

92. See *supra* note 84 and accompanying text.

same sex.<sup>93</sup> One possible response to this IRS determination to not accord equal recognition to domestic partnerships and civil unions is that it violates an often asserted tax law maxim—federal tax law must treat all like taxpayers in a like manner.<sup>94</sup> When the IRS fails to do so in its administration of the Code, taxpayers often contend that dissimilar tax treatment of similarly situated taxpayers violates due process.<sup>95</sup> However, courts have routinely rejected this contention.<sup>96</sup> In a recent decision, the First Circuit opined that “[d]espite the goal of consistency in treatment, the IRS is not prohibited from treating such taxpayers disparately. Rather than being a strict, definitive requirement, the principle of achieving parity in taxing similarly situated taxpayers is merely aspirational.”<sup>97</sup>

Although this equality maxim is apparently not considered a definitive requirement, it nonetheless presents an obvious question: why not? If the intent of such legalized same-sex relationships was to create a “separate but equal”<sup>98</sup> status for same-sex couples under various state laws, why should federal tax law not aspire to confer tax treatment equal to that of marriage? As one tax scholar has noted, tax law should lead the way in recognizing domestic partnerships and civil unions as equivalent to marriage under the long established substance-

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93. Rev. Rul. 2013-17. The ruling ostensibly overrules prior informal guidance issued on August 30, 2011 with respect to Illinois civil unions between opposite sex individuals. In that guidance, the IRS Chief Counsel’s Office opined that since the Illinois Religious Freedom Protection and Civil Union Act, 750 Ill. Comp. Stat. 75/20 (2011), “treats the parties to an Illinois civil union who are of opposite sex as husband and wife, they are considered ‘husband and wife’ for purposes of Section 6013 of the Internal Revenue Code, and are not precluded from filing jointly,” unless otherwise prohibited. A copy of the IRS letter is available at 2011 TNT 215-62 or <http://www.proskauer.com/files/uploads/Documents/IRS-Letter-2011-on-Civil-Unions-in-Illinois.pdf>.

94. BITTKER ET AL., *supra* note 44, ¶ 1.01[2], at S1-3 (3d ed. Supp. 2013).

95. *Id.*

96. *Id.* (citing *Sirbo Holdings, Inc. v. Comm’r*, 509 F.2d 1220, 1222 (2d Cir. 1975) (stating “while even-handed treatment should be the Commissioner’s goal, perfect in the administration of such vast responsibilities cannot be expected”); *Davis v. Comm’r*, 65 T.C. 1014, 1022 (1976) (stating “[i]t has long been the position of this Court that our responsibility is to apply the law to the facts of the case before us and determine that tax liability of the parties before us; how the Commissioner may have treated other taxpayers has generally been considered irrelevant in making that determination.”)); *but cf. Zelenak, Should the Courts Require the Internal Revenue Service to be Consistent?* 40 TAX. L. REV. 411, 430 (1985) (proposing a limited duty of consistency for the IRS, whereby such duty “should merely prevent the Service from strictly interpreting the Code to the disadvantage of one or a few taxpayers, while continuing the lenient interpretation as to everyone else.”).

97. *Hostar Marine Transp. Sys., Inc. v. U.S.*, 592 F.3d 202, 210 (1st Cir. 2010).

98. See Meghan Streit, *Civil Unions vs. Marriage: Separate and Not Equal*, *HuffingtonPost.com* (Feb. 14, 2013) [http://www.huffingtonpost.com/meghan-streit/civil-unions-vs-marriage-\\_b\\_2689991.html](http://www.huffingtonpost.com/meghan-streit/civil-unions-vs-marriage-_b_2689991.html).

over-form doctrine.<sup>99</sup> Furthermore, the differing treatment of equivalent relationships and the resulting preference for marriage ignores the “international trend toward adopting the individual as the taxable unit,” which recognizes “*all* economically interdependent relationships for tax purposes and not just those patterned after marriage or even those that are conjugal in nature.”<sup>100</sup>

#### IV. STATE TAX LAW IN A POST-WINDSOR WORLD

One obvious effect of *Windsor* is that state DOMA laws, whether constitutional or statutory in nature,<sup>101</sup> will likely be challenged by a presently emboldened pro-gay marriage movement.<sup>102</sup> These state cases will have to address the obvious issue that the Supreme Court avoided in its decision, whether the denial of marriage rights to same-sex couples violates their constitutional right to equal protection.<sup>103</sup> In his *Windsor* dissent, Chief Justice Roberts appeared to anticipate this result:

The dominant theme of the majority opinion is that the Federal Government’s intrusion into an area ‘central to state domestic relations law applicable to its residents and citizens’ is sufficiently ‘unusual’ to set off alarm bells . . . . Thus, while ‘[t]he State’s power in defining the marital relation is of central relevance’ to the majority’s decision to strike down DOMA here, *ibid.*, that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions.<sup>104</sup>

If these state law challenges are successful in making marriage available to same-sex couples in states where it is currently prohibited,<sup>105</sup> same-sex couples will be able to avoid incrementally the current disparate treatment between federal and state taxation laws.

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99. *Infanti*, *supra* note 71 (citing *Weinert’s Estate v. Comm’r*, 294 F.2d 750, 755 (5th Cir. 1961) (“[t]he principle of looking through form to substance is . . . the cornerstone of sound taxation.”)).

100. *Id.* (citing Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 614-18). See also Dylan Mathews, *The case for cutting the link between taxes and marriage*, WASHINGTON POST, June 27, 2013, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/27/the-case-for-cutting-the-link-between-taxes-and-marriage/>.

101. See *supra* note 9.

102. Max Segal, *36 States Will Have Little Choice On Gay Marriage*, POLICYMIC.COM (July 24, 2013), available at <http://www.policymic.com/articles/55071/after-doma-36-states-will-have-little-choice-on-gay-marriage>; see *infra* notes 150-153 and accompanying text.

103. *Id.*; see *supra* note 77 and accompanying text for the Ohio state court decision that addressed this very issue.

104. *Windsor*, 133 S.Ct. at 2697.

105. See *infra* notes 150-153 and accompanying text.

## A. STATE TAX LAW TREATMENT OF MARRIED SAME-SEX COUPLES

The obvious benefit of *Windsor* and Revenue Ruling 2013-17 is that same-sex couples that are both married and domiciled in one of the seventeen recognition states (and District of Columbia) will be consistently treated as such for both federal and state tax purposes. However, according to recent census figures, of the 114,000 of the estimated 650,000 same-sex couples in this country that are legally married, only 40 percent of them reside in a recognition state.<sup>106</sup> Accordingly, the remaining 60 percent of those married couples are domiciled in non-recognition states, resulting in continued disparate state and federal tax treatment—separate individuals for state tax purposes, but a married couple for federal tax purposes.<sup>107</sup> Discussed below are just several of the numerous state tax complexities that face same-sex married couples that are domiciled in a non-recognition state.

In this post-*Windsor* and Revenue Ruling 2013-17 world, the states that continue to ban or otherwise not recognize gay marriage will have to promulgate new statutes and regulations and revise their tax return forms. Since most states have income tax laws that are based chiefly on federal income tax law, they now will have to deal with complex and costly administrative questions of filing status, separation of jointly-reported federal income and deductions, and the reporting of income and deduction items that previously were taken directly from these taxpayer's individual federal tax returns.<sup>108</sup> With respect to filing status requirements, states with DOMA laws are coping with the effects of Revenue Ruling 2013-17 in varied ways. Louisiana and Idaho announced that same-sex couples domiciled in the state but legally married in another state jurisdiction must continue to file separate state tax returns as single, head of household or a qualifying widow.<sup>109</sup> Kansas issued a notice essentially duplicating Louisiana,

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106. Matt Viser and Tracy Jan, *New fight over gay marriage recognition*, THE BOSTON GLOBE, June 27, 2013, available at <http://www.bostonglobe.com/news/nation/2013/06/27/gaymarriage/mBotUQwFQnun3E2JqfVaCO/story.html>; Sheryl Gay Stolberg, *After Rulings, Same-Sex Couples Grapple With Diverging State Laws*, N.Y. TIMES, June 28, 2013, available at [http://www.nytimes.com/2013/06/29/us/after-rulings-same-sex-couples-grapple-with-diverging-state-laws.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/29/us/after-rulings-same-sex-couples-grapple-with-diverging-state-laws.html?pagewanted=all&_r=0).

107. *Id.*; see also Rev. Rul. 2013-17.

108. Patricia Cain, *IRS Same-Sex Marriage Ruling and Six Impossible Things Before Breakfast*, TAXPROF BLOG (Sep. 3, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/09/cain-.html](http://taxprof.typepad.com/taxprof_blog/2013/09/cain-.html).

109. Susanne Pagano, *Louisiana Won't Accept Same-Sex Marriage on State Income Tax Returns*, DAILY TAX REP. (BNA) (Sep. 23, 2013) available at 184 DTR H-2; LA. DEP'T OF REV., REV. INFO. BULLETIN NO. 13-024 (Sep. 13, 2013), <http://revenue.louisiana.gov/forms/lawspolicies/RIB%2013-024.pdf>. See also Amy Linn, *Idaho Says Same-Sex Married Couples Must File Separate State Tax Returns*, DAILY TAX REP. (BNA) (Oct. 10, 2013), available at 197 DTR H-1.



but referring to a worksheet that will be available to allocate jointly-reported federal income between the two parties.<sup>110</sup> Similarly, Wisconsin issued a new form, Schedule S: Allocation of Income to be Reported by Same-Sex Couples Filing a Joint Federal Return, to assist same-sex couples in separating and allocating their jointly reported federal adjusted income for their individual state income tax purposes.<sup>111</sup> Of the states that ban or otherwise do not recognize same-sex marriage, a majority of those states are similarly requiring same-sex married couples to file as single or head of household for state tax purposes.<sup>112</sup> However, Virginia and Utah, typically viewed as strong DOMA states, announced that pending changes in their respective state laws, all couples, including same-sex, should follow their federal filing status on their state income tax returns.<sup>113</sup> Similarly, Missouri's governor issued an executor order requiring the state Department of Revenue to accept jointly-filed tax returns from all "legally married" couples, including same-sex couples, explaining that it was the "only appropriate course of action, given Missouri statutes and the ruling by the U.S. Department of the Treasury."<sup>114</sup> The Colorado legislature enacted a bill permitting same-sex couples validly married in recognition states to file their Colorado tax returns jointly.<sup>115</sup> As Professor Patricia Cain explained, non-recognition states may have to follow the approach employed during the DOMA years by recognition states, but in reverse.<sup>116</sup> Same-sex couples in non-recognition states will likely be required to fill out "mock or dummy" individual or head-of-household federal returns to serve as the basis for their state tax returns.<sup>117</sup>

Of the forty-one states that imposed a broad-based income tax prior to *Windsor*, thirty-five utilized federal definitions of income as the starting point for their residents' computation of state taxable income tax.<sup>118</sup> Specifically, twenty-nine states used federal "adjusted

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110. Christopher Brown, *Kansas DOR Guidance: No Recognition of Same-Sex Marriages*, DAILY TAX REP. (BNA) (Oct. 7, 2013); KAN. DEPT OF REV., NOTICE 13-18 (Oct. 4, 2013), available at <http://www.ksrevenue.org/taxnotices/notice13-18.pdf>.

111. Richard Rubin, *Gay Married Couples' Angst Over Tax Filing Now Triggered by States*, BNA Daily Tax Rep. (Sep. 16, 2013) available at 195 DTR H-2; see also <http://www.revenue.wi.gov/forms/2012/ScheduleSf.pdf>.

112. See Linn, *supra* note 109.

113. See Cain, *supra* note 108.

114. Christopher Brown, *Missouri to Accept Jointly Filed Tax Returns from Same-Sex Couples*, DAILY TAX REP. (BNA) (Nov. 18, 2013) available at 222 DTR H-1.

115. Tripp Baltz, *Colorado Legislature Approves Bill Allowing Same-Sex Couples to File Joint Tax Returns*, DAILY TAX REP. (BNA) (Feb. 18, 2014) available at 33DTR H-1.

116. *Id.*

117. *Id.*

118. Ruth Mason, *Delegating Up: State Conformity with The Federal Tax Base*, 62 DUKE L. J. 1267, 1274-75 (2013), citing RICK OLIN & SANDY SWAIN, WIS. LEGISLATIVE FISCAL BUREAU, INFORMATIONAL PAPER 4, INDIVIDUAL INCOME TAX PROVISIONS IN THE

gross income" as their computation starting point.<sup>119</sup> For the thirty-six states that either have adopted some version of DOMA or have no legislation or constitutional provision with respect to same-sex marriage<sup>120</sup> and wish to continue their non-recognition of such marriages, decisions must be made in the very near term to decouple or otherwise change their conformance to the federal tax base.<sup>121</sup> Peculiarly, if states choose to decouple from the federal base to maintain their complete non-recognition of gay marriage, they could be providing opportunities to same-sex couples that are married for federal tax purposes to avoid or reduce state taxes. For example, a transaction or property transfer between individuals in a valid same-sex marriage would violate the federal related party rules, but will not be so regarded in a state that has decoupled from federal tax definitions.<sup>122</sup> Similarly, states' choice to not conform to the more inclusive federal definition of spouse will create state estate and gift tax problems. As Professor David Herzig has detailed in several recent articles, same-sex married couples living in a non-recognition state would not be liable for federal gift tax for gift transfers between themselves, but would be liable for any state gift tax that has decoupled from federal tax definitions.<sup>123</sup> In addition, Herzig has discussed complex estate tax issues that will result between the federal recognition of a same-sex marriage and the applicability of the marital deduction, and an estate tax imposed by a state that does not recognize the marriage and has decoupled from federal tax definitions.<sup>124</sup> In fact, Herzig opines that states determined to continue their non-recognition of same-sex marriage will, as a result of declining to follow federal tax definitions, have to enact their own estate taxation, further intensifying their problems.<sup>125</sup>

The above-described state conformity to the federal income tax system will further cause states that do not recognize same-sex marriage to cope with differences in federal reporting requirements and the resulting disparate impact. For example, employers that offer

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STATES 1-2 (2011), [http://legis.wisconsin.gov/lfb/publications/Informational-Papers/Documents/2011/4\\_individual%20income%20tax%20provisions%20in%20the%20states.pdf](http://legis.wisconsin.gov/lfb/publications/Informational-Papers/Documents/2011/4_individual%20income%20tax%20provisions%20in%20the%20states.pdf).

119. *Id.*

120. *See supra* note 9.

121. David Herzig, *Rev. Rul. 2013-17, Gay Marriage, and Taxes*, TAXPROF BLOG (Aug. 30, 2013), [http://taxprof.typepad.com/taxprof\\_blog/2013/08/herzig-.html](http://taxprof.typepad.com/taxprof_blog/2013/08/herzig-.html).

122. *See id.* (citing Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008)); *see also* Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI-KENT L. REV. 481 (2009).

123. *See Herzig, supra* note 121.

124. *See Herzig, supra* note 15; *see generally*, Tara Siegel Bernard, *Gay and Married Couples in New Land of Taxation*, N.Y. TIMES, (Aug. 30, 2013), available at [http://www.nytimes.com/2013/08/31/your-money/gay-marrieds-enter-new-land-of-federal-taxation.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/31/your-money/gay-marrieds-enter-new-land-of-federal-taxation.html?pagewanted=all&_r=0).

125. *Id.*

same-sex spouses health benefits will no longer have to report those company-paid premiums as taxable income on their employees' W-2 forms in light of the IRS's adoption of the state-of-celebration rule.<sup>126</sup> However, if states want to decouple from federal definitions and continue to tax such benefits, they will have to amend their reporting requirements and forms and notify employers accordingly.<sup>127</sup> This will result in additional reporting and compliance costs for employers subject to the taxing jurisdiction of such states.

Another "less obvious" consequence of *Windsor* and Revenue Ruling 2013-17, as recently noted by Professor Patricia Cain, is the treatment of separation and divorce transfers between same-sex married couples that separate or divorce.<sup>128</sup> Although raising some of the issues addressed herein, Professor Cain has specifically addressed timing issues—the interplay between the federal tax consequences of same-sex spouses' divorces that occurred while DOMA Section 3 was still effective and the present tax treatment of those divorce settlements in light of Section 3's demise under *Windsor*.<sup>129</sup> For same-sex married couples that separate or divorce post-*Windsor*, because they are now recognized as married for federal tax purposes, any alimony paid incident to that divorce will be taxable to the recipient and deductible by the payor, unless they elect out of such treatment in their separation agreement or final divorce decree.<sup>130</sup> If the couple resides in a non-recognition state and presumably will regard similarly their separation or divorce (that occurred in the recognition state as necessary under family law rules),<sup>131</sup> how will that state treat such payments for state income tax purposes?

While DOMA was still effective, Professor Cain opined that such payments between individuals in a dissolving civil union should have remained nontaxable for federal income tax purposes because the alimony paid "arises not from the contract, but from the relationship."<sup>132</sup> Will a state that has decoupled from federal tax definitions to maintain its non-recognition of same-sex marriage arrive at the same conclusion of nontaxability? In addition, for federal tax purposes, any property transferred between the two former spouses incident to the divorce will be treated as a nontaxable event for both parties, with the transferee taking a carryover basis in the property received.<sup>133</sup> Again,

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126. Rubin, *supra* note 111.

127. *Id.*

128. Cain, *supra* note 71.

129. *Id.*

130. I.R.C. §§ 71, 215 (2013).

131. Cain, *supra* note 71.

132. Patricia A. Cain, *Federal Consequences of Civil Unions*, 30 CAP. U. L. REV. 387, 403 (2002) (citing *Gould v. Gould*, 245 U.S. 151, 153-54 (1917)).

133. I.R.C. § 1041 (2013).

if it has decoupled from federal tax definitions, the same-sex couples' state of domicile will likely regard all transfers incident to the divorce to be taxable transfers.<sup>134</sup> Finally, with the demise of DOMA, the assignment of retirement plan benefits pursuant to a qualified domestic relations order, with no federal income tax consequences to the transferor or transferee (with a qualified rollover), is now possible.<sup>135</sup> Again, if the domicile state has decoupled from federal tax definitions, will the transferor spouse be taxed on the distribution out of his or her retirement plan for state tax purposes? So many questions from both federal and state tax viewpoints remain unanswered.<sup>136</sup>

In the end, non-recognition states face some daunting taxation issues with respect to same-sex married couples residing in their states. States will have to weigh the benefits of continued non-recognition against the costs associated with decoupling from federal tax definitions, including statutory amendments, promulgation of new regulations, revisions to tax returns and forms, issuance of taxpayer guidance, and retooling of computer systems to name a few. It is dubious to assert that these tax complexities and costs might drive states towards recognition, but these factors can certainly add to the discussion. Nevertheless, as Professor Cain has opined, the issuance of Revenue Ruling 2013-17 and the resulting tax complexities and costs for states with continued DOMA laws, might "pave the way for marriage equality for the entire country!"<sup>137</sup>

#### B. STATE TAX LAW TREATMENT OF SAME-SEX COUPLES IN LEGALLY-RECOGNIZED RELATIONSHIPS OTHER THAN MARRIAGE

Currently, Colorado permits civil unions that provide same-sex couples with spousal rights, and Nevada and Oregon (and District of Columbia) offer broad domestic partnerships conferring such rights (with Wisconsin offering a limited domestic partnership), none of which are recognized as equivalent to marriage for federal tax purposes.<sup>138</sup> After *Windsor*, the unanswered question was whether a couple in a civil union was domiciled in state that regards their union

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134. See generally, Cain, *supra* note 132, 30 CAP. U. L. REV. at 403-06 for a discussion of the tax treatment of property settlements prior to the enactment of I.R.C. § 1041 (2013).

135. Cain, *supra* note 71. See I.R.C. § 414(p)(1) (2013).

136. *Id.*

137. Cain, *supra* note 108.

138. See NAT'L CONF. OF STATE LEGISLATURES, CIVIL UNIONS & DOMESTIC PARTNERSHIP STATUTES (2013), <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>; see also *supra* notes 93. It is unclear how the state court decision will affect civil unions in New Jersey. Hawaii and Illinois permit civil unions together with same-sex marriage. *Id.*; see *infra* note 153 and accompanying text.

as equivalent to marriage; specifically, will the IRS follow suit for federal tax purposes or must that couple marry to avail themselves of federal tax and other benefits according to married couples? As previously stated, in Revenue Ruling 2013-17, the IRS declined to accord marriage treatment to civil unions or domestic partnerships, regardless of whether the individuals in such relationships are of the opposite sex or same sex.<sup>139</sup> Even prior to the IRS promulgating the ruling, the federal government announced shortly after the *Windsor* decision that federal employee benefits will not be extended to non-married couples in civil unions or domestic partnerships; only same-sex spouses and children of legally married federal employees holding marriage licenses from one of the seventeen recognition states (and District of Columbia) will qualify for such benefits.<sup>140</sup> Other federal agencies have similarly decided to only extend federal benefits to same-sex couples that are legally married, further creating a significant difference between same-sex marriage and civil unions or domestic partnerships under the law.<sup>141</sup>

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139. See *supra* note 93 for discussion of IRS letter ruling on federal filing status for an opposite-sex couple in an Illinois civil union. Because civil unions in Colorado, Hawaii and Illinois are open to opposite-sex couples, these couples will suffer similar state and federal tax differences and complexities to those of same-sex couples. See *supra* note 138.

140. Josh Hicks, *Federal benefits won't extend to domestic partners under DOMA ruling*, WASHINGTON POST, July 8, 2013, <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/07/federal-benefits-wont-extend-to-domestic-partners-under-doma-ruling/>; OFFICE OF PERS. MGMT., BENEFITS ADMIN. LTR. 13-203, COVERAGE OF SAME-SEX SPOUSES (July 17, 2013), available at <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>.

141. See, e.g., Stmt. of Secretary of Homeland Security (July 1, 2013), available at <http://www.dhs.gov/news/2013/07/01/statement-secretary-homeland-security-janet-napolitano-implementation-supreme-court> (immigrant visa petitions filed on behalf of a same-sex spouse will be reviewed in same manner as those filed on behalf of an opposite-sex spouse); FED. ELECTION COMM., PROVISIONS APPLY EQUALLY TO SAME-SEX SPOUSES, AO 2013-06 (Aug. 1, 2013), available at <http://www.fec.gov/pages/fecrecord/2013/september/ao2013-06.shtml> (for purposes of campaign finance law, "same-sex couples married under State law are 'spouses' for the purpose of [FEC] regulations."); U.S. DEPT. OF DEFENSE, DOD ANNOUNCES SAME-SEX SPOUSE BENEFITS, NEWS RELEASE No. 581-13 (Aug. 14, 2013), available at <http://www.defense.gov/releases/release.aspx?releaseid=16203> (spousal and family benefits available, regardless of sexual orientation, as long as service member-sponsors provide a valid marriage certificate); U.S. DEPT. OF HEALTH & HUMAN SERVICES, HHS ANNOUNCES FIRST GUIDANCE IMPLEMENTING SUPREME COURT'S DECISION ON THE DEFENSE OF MARRIAGE ACT (Aug. 29, 2013), available at <http://www.hhs.gov/news/press/2013pres/08/20130829a.html> ("this guarantee of [Medicare] coverage applies equally to couples who are in a legally recognized same-sex marriage, regardless of where they live."); Charlie Savage, *V.A. to Provide Spousal Benefits to Gays*, *Administration Says*, N.Y. TIMES, Sep. 4, 2013, available at <http://www.nytimes.com/2013/09/05/us/va-to-provide-spousal-benefits-to-gays-administration-says.html> (in letter to Congressional leaders, Attorney General Eric Holder stated that 38 U.S.C. §§ 101(3) and 101(31), which define "surviving spouse" and "spouse" as only a person of the opposite sex of the veteran, "as applied to same-sex couples who are legally married under state law, violate the equal protection component of the Fifth Amendment."); U.S.

Although many in the LGBT community may celebrate the IRS decision to not include these relationships in the definitions of marriage or spouse,<sup>142</sup> the tax complexities for couples in these legally-recognized relationships continue even after *Windsor*. As before, they will not be regarded as married for federal tax purposes and, thus, will have to file as single or head of household. Similarly, if the couple resides in a state that recognizes their legal relationship as equivalent to marriage, the couple will likely be able to file jointly for state taxation purposes.<sup>143</sup> Again, just as prior to *Windsor* and Revenue Ruling 2013-17, these couples might be made to fill out a mock federal joint return to serve as bases for their joint state tax return.<sup>144</sup>

The difficult reality for these couples is that their legally-recognized relationship may be equivalent to marriage for state law purposes only, including state tax law, but not under federal tax law. One answer for these couples might be to avail themselves of the opportunity to marry in one of the seventeen recognition states (or District of Columbia).<sup>145</sup> Presumably, a couple's marriage in a recognition state will invalidate or necessitate dissolution of a civil union or domestic

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DEPT. OF LABOR, GUIDANCE TO EMPLOYEE BENEFIT PLANS ON THE DEFINITION OF "SPOUSE" AND "MARRIAGE" UNDER ERISA AND THE SUPREME COURT'S DECISION IN UNITED STATES V. WINDSOR, TECH. REL. NO. 2013-04 (Sep. 18, 2013), available at <http://www.dol.gov/ebsa/newsroom/tr13-04.html> ("term 'marriage' will be read to include a same-sex marriage that is legally recognized as a marriage under any state law . . . . The terms 'spouse' and 'marriage,' however, do not include individuals in a formal relationship recognized by a state that is not denominated a marriage under state law, such as a domestic partnership or a civil union, regardless of whether the individuals who are in these relationships have the same rights and responsibilities as those individuals who are married under state law."). But see, Ann Carns, *Same-Sex Couples Are Urged to Apply for Social Security Spousal Benefits*, N.Y. TIMES, Sep. 17, 2013, [http://www.nytimes.com/2013/09/17/your-money/same-sex-couples-are-urged-to-apply-for-social-security-spousal-benefits.html?\\_r=0](http://www.nytimes.com/2013/09/17/your-money/same-sex-couples-are-urged-to-apply-for-social-security-spousal-benefits.html?_r=0) (Social Security Administration "inviting applications not just from those in same-sex marriages, but also those in other legal same-sex relationships, like civil unions or registered domestic partnerships.").

142. Cain, *supra* note 108. For federal tax purposes, Professor Cain agreed with the Obama administration's argument in the California Proposition 8 case that it was an equal protection violation "for states to provide all the same benefits and responsibilities of marriage" through domestic partnerships and civil unions "without going the next step and providing marriage." *Id.*

143. Nomaan Merchant, *Illinois to let civil-union couples file tax returns*, CHI. SUN TIMES, Nov. 29, 2011, available at <http://www.suntimes.com/news/9143114-418/illinois-to-let-civil-union-couples-file-tax-returns.html>; N.J. DEPT. OF TREAS., N.J. INCOME TAX – FILING STATUS (2012), available at <http://www.state.nj.us/treasury/taxation/njit1.shtml>. But see Colorado Civil Unions Act, sec. 14-15-117, available at [http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/35CE5FDC5F040FF487257A8C0050715D?Open&file=011\\_enr.pdf](http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/35CE5FDC5F040FF487257A8C0050715D?Open&file=011_enr.pdf) ("Since Colorado income tax filings are tied to the federal income tax form by requiring taxpayers to pay a percentage of their federal taxable income as their state income taxes, this prevents the filing by the parties to a civil union of a joint state income tax return.").

144. Cain, *supra* note 108.

145. See *supra* note 9.

partnership in the state of celebration, which may or may not coincide with their state of domicile.<sup>146</sup> If that is the result,<sup>147</sup> the couple will find themselves in a “Catch-22” similar to same-sex couples validly married but domiciled in a non-recognition state – their marriage will simply reverse their tax problems by being recognized as married for federal tax purposes under the state-of-celebration rule, but treated as non-married individuals for state tax purposes.

One possible solution to the non-recognition of civil unions and domestic partnerships under federal tax rules is the recent introduction of the Federal Benefits Equality Act,<sup>148</sup> which seeks to extend federal benefits currently granted to married couples to other couples in legal unions similar to marriage, including domestic partnerships and civil unions.<sup>149</sup> Such legislation, if enacted, could lead to a duplication of federal and state tax treatment for couples who are in such a legally-recognized relationship, and reside either in the state of celebration or a state which recognizes their relationship.

The continued viability of civil unions and domestic partnerships as legal recognition vehicles for same-sex couples may be in question if a recent New Jersey case provides an accurate glimpse into the future. In *Garden State Equality v. Dow*,<sup>150</sup> a state court judge ruled, in accordance with established state precedent, that New Jersey was required under its constitution to grant same-sex couples “all the same rights and benefits that are available to opposite-sex married couples.”<sup>151</sup> In light of the United States Supreme Court decision in *Windsor* and the subsequent denial of federal benefits to civil union couples, the state court concluded that New Jersey same-sex couples in civil unions were no longer eligible to receive the same rights and

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146. See, e.g., *Elia-Warnken v. Elia*, 463 Mass. 29 (2012) (Massachusetts same-sex marriage was void *ab initio* (treated as if never occurred) because one of the spouses was a partner in an undissolved Vermont civil union at the time of the marriage); see also Joanna L. Grossman, *Beware the Undissolved Civil Union: Massachusetts’ Highest Court Says That A Subsequent Marriage is Polygamy*, JUSTIA.COM (Aug. 21, 2012), <http://verdict.justia.com/2012/08/21/beware-the-undissolved-civil-union> (court decision essentially provided that “civil unions from other states should be recognized, just as marriages are, on grounds of comity.”).

147. See John G. Culhane, *United States v. Windsor and the Future of Civil Unions and Other Marriage Alternatives*, 59 VILL. L. REV. TOLLE LEGE 27 (2013).

148. Federal Benefits Equality Act, H.R. 2835, 113th Cong., 1st Sess. (2013), available at <http://www.govtrack.us/congress/bills/113/hr2834#overview>. A related, but more narrow, bill, the Domestic Partnership Benefits and Obligations Act of 2013, H.R. 3135 & S. 1529, 113th Cong., 1st Sess. (2013), seeks to provide certain benefits to domestic partners of Federal employees.

149. *Id.*

150. *Garden State Equality v. Dow*, 2013 WL 6153269 (Sep. 27, 2013), available at [http://www.judiciary.state.nj.us/samesex/Decision\\_Summary\\_Judgment.pdf](http://www.judiciary.state.nj.us/samesex/Decision_Summary_Judgment.pdf).

151. *Id.* at 52, citing *Lewis v. Harris*, 188 N.J. 415 (2006).

benefits as their opposite-sex counterparts.<sup>152</sup> The state court ultimately concluded that New Jersey must extend civil marriage to same-sex couples beginning on October 21, 2013, to eradicate this unequal treatment and thereby satisfy the equal protection guarantee contained within the New Jersey Constitution.<sup>153</sup>

## V. CONCLUSION

The *Windsor* decision and the IRS's subsequent guidance in Revenue Ruling 2013-17 are reshaping the federal and state tax world almost daily. Recognition states are retooling their state tax filing, processing and enforcement systems to achieve the same parity with the federal tax system as to same-sex married couples that has already existed with respect to opposite-sex married couples. Same-sex couples that are married and reside in recognition states will realize the full benefit of these advances in both federal and state tax law. States that provide marital-like status to same-sex couples through domestic partnerships or civil unions will continue to have a mismatch with the federal tax system as to filing status, joint reporting of income, and potentially other income and deduction items. These states will have to consider the benefits of allowing gay marriage from both an equal protection perspective, as recently occurred in New Jersey, as well as from a tax administration viewpoint. As the Ninth Circuit Court of Appeals determined in *Perry v. Brown*<sup>154</sup> with respect to the constitutionality of California's Proposition 8, no legitimate interest of the State was furthered by "taking away the official designation" of "marriage" from same-sex couples, while continuing to afford those couples all the rights and obligations of marriage through domestic partnerships.<sup>155</sup>

States that neither recognize same-sex marriage nor provide a domestic partnership or civil union alternative perhaps face the most daunting tasks. Having had no experience with reconciling disparities between their state tax system and the federal tax regime, these states will now have to decide whether to continue to piggyback off the federal tax regime with modifications, such as preparation of dummy federal individual returns and requiring separate state reporting of

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152. *Id.* at 52-53.

153. *Id.*; see also David Voreacos & Terrence Dopp, *New Jersey Same-Sex Weddings Must Be Allowed, Judge Rules*, BLOOMBERG.COM (Sep. 27, 2013), available at <http://www.bloomberg.com/news/2013-09-27/new-jersey-same-sex-couples-must-be-allowed-to-marry-judge-says.html>.

154. 671 F.3d 1052 (9th Cir. 2012) *cert. granted*, 133 S. Ct. 786, 184 L. Ed. 2d 526 (U.S. 2012) and *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (U.S. 2013).

155. *Perry v. Brown*, 671 F.3d 1052, 1095 (citing *Romer v. Evans*, 517 U. S. 620, 632-33, 635 (1996)).



employee benefits conferred to a same-sex spouse, or consider decoupling all together. Accordingly, with respect to resident same-sex couples that married in a recognition state and now recognized as such for federal tax purposes, these non-recognition states' choices and solutions are neither simple nor without numerous administrative costs.

Trapped within this web of federal tax and state tax disparities and complexities are the majority of same-sex couples that are married or otherwise in a legally-recognized relationship and living in non-recognition states. Some success has been achieved recently by challenging these states' nonrecognition of marriages validly performed in another state or country on equal protection grounds.<sup>156</sup> In the interim, those married same-sex couples have no choice but to navigate the difficult tax waters of federal recognition and state non-recognition, not fully realizing the benefits of *Windsor* or Revenue Ruling 2013-17. Those couples in legally-recognized domestic partnerships or civil unions will continue to cope with a potentially separate, but equal, joint status from a state tax viewpoint, but denial of any such status from a federal tax standpoint. Although *Windsor* and Revenue Ruling 2013-17 may eventually "pave the way for marriage equality" throughout the country,<sup>157</sup> the complex variances between federal and state tax law that still exist look more like dysfunction than equality.

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156. Andrew Wolfson, *Gay marriage in Kentucky gains foothold with federal judge's ruling*, COURIER-JOURNAL.COM (Feb. 13, 2014), [http://www.courier-journal.com/article/20140212/NEWS10/302120050/Kentucky-ban-gay-marriages-from-other-states-struck-down-by-federal-judge?ncklick\\_check=1](http://www.courier-journal.com/article/20140212/NEWS10/302120050/Kentucky-ban-gay-marriages-from-other-states-struck-down-by-federal-judge?ncklick_check=1). See also, Doug Moore, *Eight gay couples sue Missouri over its ban on same-sex marriage*, STLTODAY.COM (Feb. 12, 2014), [http://www.stltoday.com/news/local/govt-and-politics/eight-gay-couples-sue-missouri-over-its-ban-on-same/article\\_8c4360cc-c6c9-5d5e-8e52-8e30c64c1c47.html](http://www.stltoday.com/news/local/govt-and-politics/eight-gay-couples-sue-missouri-over-its-ban-on-same/article_8c4360cc-c6c9-5d5e-8e52-8e30c64c1c47.html).

157. See *supra* note 137 and accompanying text.

